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EDITORIAL COMMENT

THE CORRESPONDENCE REGARDING THE S. S. SUSSEX

The negotiations between the Governments of the United States and Germany regarding the *Lusitania* were believed to be approaching a conclusion when, on March 24, 1916, the unarmed French steamship *Sussex*, while crossing from Folkestone to Dieppe with 325 or more passengers, among them a number of American citizens, was torpedoed and sunk in the Channel.

On March 27th inquiry was made by the Secretary of State of the United States through the American Ambassador at Berlin if the *Sussex* was sunk by a submarine belonging to Germany or her allies, and in the next few days similar inquiries were made regarding four other vessels reported to have been sunk with American citizens on board, thus re-

newing the whole question of the methods employed by Germany in submarine warfare.

The circumstances of this renewal of the submarine policy of Germany, after the tardy endeavor to reach an understanding with the United States regarding the *Lusitania*, were of a nature to aggravate the new offense. The evasive character of Germany's reply to the notes of inquiry in the face of the evident facts, was tempered in only a slight degree by a request for such evidence regarding the sinking of the *Sussex* as the United States might be able to furnish. This, happily, was abundant, precise, and overwhelming; and the German Government was unable to escape the conclusions that the *Sussex* had never been armed, that the vessel had been habitually used for the conveyance of passengers across the Channel, that the route followed was not the one taken by troop ships or supply ships, that about 80 of her passengers,—non-combatants of all ages and both sexes, including citizens of the United States,—were killed or injured, and that the cause of the sinking was a torpedo of German manufacture sent without warning from a submarine.

In the note of April 18th, in which the evidence supporting these conclusions was furnished, the Secretary of State said:

If it is still the purpose of the Imperial Government to prosecute relentless and indiscriminate warfare against vessels of commerce by the use of submarines without regard to what the Government of the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity, the Government of the United States is at last forced to the conclusion that there is but one course it can pursue. Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passenger and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether.

Such an attitude was not only justified by every consideration of international law and national duty, but was absolutely necessary to support any pretense that the rights of American citizens on the sea would henceforth be protected. The limit had been reached beyond which long-suffering could not go. In making this decision, therefore, there was no room for doubt or debate. Not to have made it would have been to abdicate the place of the United States among civilized nations.

This is not an occasion for a general review of the diplomacy of the United States regarding the submarine policy of Germany, but it is

proper to say that the juncture reached in the case of the *Sussex* was an inevitable consequence of the ground taken by the Imperial German Government, and was as certain at the beginning of its practice as it became in the end. The only fundamental question throughout the entire prolonged negotiations on that subject was just *when* the ultimatum would have to be delivered. From the first it was evident either that the German policy must give way or that international law would continue to be disregarded and American lives imperilled.

The attitude taken in reply to the American demands completely establishes this assertion. While unwilling to admit in explicit terms that the sinking of noncombatant ships without warning and without making provision for the safety of noncombatants on such ships is illegal, the Imperial German Government practically admits that it is so. The practice is defended in the note of May 4th, in reply to the American note of April 18th, not as a legal form of warfare but as a form of reprisal. The German Government has never asserted its legal right to destroy the lives of noncombatants at sea. It knows that it has no such right. In the note just referred to it is stated: "The German submarine forces have had, in fact, orders to conduct submarine warfare in accord with the general principles of visit and search and destruction of merchant vessels as recognized by international law." But this, it is explained, was never promised and never intended to apply, except outside "the war zone surrounding Great Britain." Within that zone, it is contended, "in self-defence against the illegal conduct of British warfare, while fighting a bitter struggle for her national existence, Germany had to resort to the hard but effective weapon of submarine warfare." It is necessity, not law, it is alleged, that has inspired her conduct. "As the German Government has repeatedly declared," says the note of May 4th, "it cannot dispense with the use of the submarine weapon in the conduct of warfare against enemy trade." The situation thus created was, in effect, the complete abolition of international law in an important area of travel and commerce as far as the rights of noncombatants, including neutrals, were concerned. For them it ceased to afford the slightest means of protection against sudden death.

It is hardly within the scope of these comments to express opinions regarding the question of reprisals, either as to who was the belligerent responsible for resorting to them or the degree of equity with which they have been carried out. But one thing is clear. Whatever the merits of this question may be, there is no just ground for the position

taken by the Imperial German Government, that it may resort to reprisals without regard to their effect upon the lives of the citizens of neutral Powers with which it desires to be at peace. There are other necessities besides those of a single Power, even though fighting for its existence; and not to respect them is not only an illegal, it is an unfriendly act.

The Imperial German Government fully comprehends this, and declares its willingness to make a "further concession;" that is, a nearer approach to the recognized requirements of international law. "In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law," runs this new concession, "such vessels, both within and without the area declared as a naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance."

It is somewhat surprising, after the faith imposed in the formal pledge previously given, that "liners will not be sunk by our submarines without warning and without safety of the lives of noncombatants, provided that the liners do not try to escape or offer resistance," to find the new formula described as a "further concession." In the words last quoted no exception is made of a "war zone." This pledge is as absolute and as unrestricted as to locality as the later one. In truth, the new assurance is less satisfactory than the old one, for it not only justifies Germany's course by a complaint that the Government of the United States has not used its power to restrain the conduct of Great Britain, that it has not shown sympathy with Germany's extremity, and that it has even supplied her enemies with all kinds of war material; but reserves "complete liberty of decision," in case steps proposed to be taken by the Government of the United States should not attain the result of removing the occasion for Germany's reprisals. In brief, "It will be understood," runs the note, "that the appeal made by the Government of the United States to the sentiments of humanity and to the principles of international law can not, under the circumstances, meet with the same hearty response from the German people which such an appeal is otherwise always certain to find here."

How far the controversy regarding the *Lusitania* and the *Sussex* really is from a definitive settlement is evident from the reply to the last German note on this subject by the American Secretary of State. "The Government of the United States," he says, "notifies the Imperial

Government that it can not for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any other Government affecting the rights of neutrals and noncombatants. Responsibility in such matters is single, not joint; absolute, not relative."

So far, therefore, as the correspondence is concerned, the attitude of both Governments remains essentially unchanged, and none of the questions involved has received a final solution.

DAVID JAYNE HILL.

BRITISH ORDERS IN COUNCIL AND INTERNATIONAL LAW

From time to time the press informs the public that on such and such a date a British Order in Council has been issued affecting the rights of neutrals, and the question is debated whether or not the Order in Council, contrary to international law, is binding upon neutrals and whether, indeed, the Order contrary to international law is binding upon prize courts in which the question of capture of neutral property is to be contested. It is therefore of interest to consider the nature of an Order in Council, its relation to an act of Parliament, its effect upon the rights of neutrals, and its authority in British prize courts.

Sir William Anson says, in *The Law and Custom of the Constitution*, that "an Order in Council is practically a resolution passed by the King in Council, communicated by publication or otherwise to those whom it may concern." After this brief definition, the learned author gives the following as an example of the wording of such an order:

At the Court at _____, the 1st day of June, 1907.

Present,—

The King's most excellent Majesty in Council.

His Majesty, by and with the advice of his Privy Council, doth order and it is hereby ordered. * * * ¹

After contrasting the Cabinet and Privy Council, of which latter body the Cabinet are members, the same learned author says:

The Cabinet considers and determines how the King's Government may best be carried on in all its important departments; the Privy Council meets to carry into

¹ Anson's *Law and Custom of the Constitution*, Vol. II, 3d ed., Part 1, p. 50.